IN THE

# Supreme Court of the United States

OCTOBER TERM—1947

**No. 50**

JESSE M. DONALDSON, individually and as Postmaster General of the United States,

*Petitioner,*

v.

READ MAGAZINE, INC., *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

## BRIEF FOR THE RESPONDENTS IN ANSWER TO QUESTIONS PROPOUNDED BY THE COURT

MAC ASBILL,
W. LAWRENCE KEITT,
JOHN W. BURKE, JR.,
*Counsel for Respondents.*

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### Order for Reargument

On October 24, 1947, this case was argued orally before the Court. On November 17, 1947, the Court issued an order restoring the case to the docket for reargument. The order states that on reargument counsel need not further discuss the sufficiency of the evidence to support the Postmaster General's findings, and requests counsel to discuss specific questions set forth in the order. The questions, and answers thereto, follow in the same sequence as the questions appear in the order.

**Question No. 1. Does the fraud order prohibit delivery of mail and postal money orders to Facts Magazine and all its employees, including its Editor-in-Chief?**

The question must be answered in the affirmative.

The fraud order directs the withholding of mail and postal money orders from (R. 22):

> "* * * Puzzle Contest, Facts Magazine; Contest Editor, Facts Magazine; Judith S. Johnson, Contest Editor; Miss J. S. Johnson, Contest Editor; Contest Editor; Facts Magazine; and Henry Walsh Lee, Editor-in-Chief, Facts Magazine, and their officers and agents as such, at New York * * *."

Facts Magazine and its Editor-in-Chief are specifically named. The prohibition further restricts delivery of mail and postal money orders to the "officers and agents as such" of Facts Magazine, and covers all its employees since every employee is an officer or agent of the magazine. Even should the words "as such" be interpreted as limiting the order to mail addressed to an officer or agent under his official title, the effect of the order would, as a practical matter, stop delivery of all business mail intended for Facts Magazine. In the course of business, envelopes addressed to any officer or employee of Facts Magazine invariably show the title or representative capacity of the addressee.

**Question No. 1(a). Is the order within the Postmaster General's authority under 39 U. S. C. §§ 259, 732?**

The question must be answered in the affirmative.

Title 39 U. S. C. §§ 259 and 732 authorize issuance of a fraud order withholding delivery of all mail to "any person

or company" or "to the agent or representative of any such person or company" found to be conducting a fraudulent scheme.

Every employee of Facts Magazine is an "agent or representative" of the company as those terms are generally used. Hence, the broad prohibition was authorized by the statute, assuming that the evidence justified the determination of the Postmaster General that Facts Magazine "is conducting" a fraudulent scheme.

**Question No. 1(b). Do these code provisions, in violation of the First Amendment, or any other constitutional provisions, abridge the freedom of speech or press of either the senders or the sendees of the mail or money orders.**

The question must be answered in the affirmative.

**a. Effect of the fraud order**

"Facts" is a magazine devoted to the dissemination of ideas and the discussion of current topics (R. opp. 87). By the instant fraud order it has been held to be subject to deprivation of delivery of all mail (R. 22).

The fraud order by its terms does not deny to Facts Magazine admission to the mails; nor does it expressly deprive the publisher, Read Magazine, Inc. of the use of the mails in the circulation of the magazine. The order deprives the publisher of the right to receive any mail addressed to the Magazine or its employees. Nevertheless, the order and the statutes under which it was issued operate to suppress Facts Magazine, for suppression must result from the inability of the publication to receive mail.

Denial of the right to receive mail means banishment from the subscription market, since the subscription business is almost exclusively carried out through the mail.

Old subscribers cannot renew their subscriptions; persons are prevented from becoming new subscribers. News dealers and others who desire to buy extra copies of the magazine cannot do so. Authors are unable to offer literary material to the editor for publication. Business concerns cannot negotiate with Facts Magazine for the sale of newsprint, ink and all other supplies necessary to publish a magazine. In brief, the order operates to restrict if not to prohibit the making and performing of all contracts and the engaging in all transactions essential to publication and circulation.

There is nothing in the record to show that Facts Magazine carried any advertisement or other reference to the puzzle contest after the April, 1945 issue of the magazine. Indeed, the Postmaster General took no action to exclude the magazine itself from the mail on the ground that it published fraudulent matter. There was no prosecution against the publishers of the magazine under the criminal code (18 U. S. C. A. § 338) for circulating advertisements and information concerning the puzzle contest. The sole action was directed against the senders of mail to Facts Magazine and its employees.

While the fraud order and the authorizing statutes have their greatest effect upon the sendees of mail intercepted by the Postmaster General, they also have injurious effect upon the senders of such mail. The Postmaster General may seize and detain all mail, the bulk of which includes letters concerned with unquestionably legitimate business. Senders of the intercepted mail, whether it concerns the alleged fraud or not, are denied the right to written communication with the sendees and consequently are denied the right of speech through an important medium of expression.

A temporary injunction and permanent injunction (R. 44, 57) issued by the District Court on October 2 and 19

and November 27, 1945 have permitted Facts Magazine and its employees to receive mail during the pendency of this case. Should the validity of the fraud order be sustained by this Court, the permanent injunction would be dissolved, and the fraud order would become operative for the indefinite future. On December 8, 1947, the Postmaster General voluntarily attempted to modify the fraud order so that, after that date, Facts Magazine, its editor-in-chief and other officers and agents as such were not subject to such order. However, in the absence of the injunctions, all mail addressed to Facts Magazine and all its employees, prior to December 8, 1947, would have been intercepted by the Postmaster General; and such interception would have resulted in the deprivation of rights of the senders and sendees of the intercepted mail.

**b. Summary statement of Constitutional violations**

The power to police the mails is exercised under the constitutional provision (Art. 1, § 8, CL. 7) that "The Congress shall have Power . . . To establish Post Offices and post Roads." This power, like all the other powers of Congress is subject to the limitations of the Bill of Rights. *Burton* v. *United States*, 202 U. S. 344, 371. Because of the effect of the fraud order upon the rights of both the sendees and senders of the mail the code provisions under which the order was issued violate several provisions of the Federal Constitutional. The code provisions abridge the freedom of press and speech guaranteed to Facts Magazine and to senders of mail and postal money orders by the First Amendment; deprive Facts Magazine of its rights under the Fourth, Fifth, Sixth and Eighth Amendments and under Article III, § 2, cl. 3, and deprive senders of mail and postal money orders of their rights under the First, Fifth, Sixth and Eighth Amendments and under Article III, § 2, cl. 3. In the following discussion of the constitutional rights of Facts Magazine and of send-

ers of intercepted mail, the rights of the magazine's editor-in-chief and other employees will be considered as merged with the rights of the magazine.

## A. THE CODE PROVISIONS DEPRIVE FACTS MAGAZINE OF FREEDOM OF THE PRESS IN VIOLATION OF THE FIRST AMENDMENT

The First Amendment reads in part:

> "Congress shall make no laws . . . abridging the freedom . . . of the press . . . ."

Although early Supreme Court cases recognized that the postal power was subject to the right of freedom of the press, these cases on one theory or another upheld the exercise by Congress of almost plenary power to exclude from the mail publications deemed harmful to the efficiency of the mail service or to the welfare of the public. But more recent decisions have made manifest that the broad authority vested in the Postmaster General requires curbing in instances where freedom of the press suffers through exercise of that authority.

### 1. *Early decisions do not sustain code provisions against attack under First Amendment by Facts Magazine*

The Postmaster General probably will contend that the constitutionality of his authority to issue fraud orders such as the one now before this Court has long been settled. However, respondents submit that an examination of the early cases discloses that the precise question involved in the present case has not been passed upon.

*Ex parte Jackson*, 96 U. S. 727, was the first important case on the subject of exclusion of immoral matter from the mail. The depositor of a lottery circular challenged a statute, making it an offense to deposit letters or circulars concerning lotteries and other fraudulent schemes in the mails, as violative of the freedom of the press guaranteed by the

First Amendment. This Court justified the exclusion on the ground that use of the mails is a privilege which Congress can grant or withhold upon any conditions it pleases. The constitutional argument was by-passed by the assertion that free access to the mails was unnecessary, since other means of circulation were available.

Soon after the amendment in 1890 of the statute making it an offense to deposit newspapers and other periodicals containing lottery advertisements and information in the mails, this Court again passed upon the constitutionality of the statute in *In re Rapier*, 143 U. S. 110. This case involved a criminal prosecution for depositing in the mails a newspaper containing an advertisement of a lottery. The contention that the statute violated freedom of the press was rejected on the authority of *Ex parte Jackson* and the Court reaffirmed the privilege doctrine. It is apparent from the *Rapier* decision that the Court justified the exclusion, as it did in *Ex parte Jackson*, only because other media of circulation had been left open to the excluded matter (See dissenting opinion of Chief Justice FULLER in *Champion* v. *Ames*, 188 U. S. 321).

In *Horner* v. *United States*, 143 U. S. 207, Horner had been convicted of sending a lottery circular through the mail. Rejecting the contention that the statute authorizing the prosecution deprived the defendant of freedom of the press, the Court merely cited the *Rapier* case as decisive.

A fraud order under the statute here in question was involved in *American School of Magnetic Healing* v. *McNulty*, 187 U. S. 94. The order forbade the delivery of mail to the School because the Postmaster General had found that the School was representing through the mails that it could cure disease through mental influences. The constitutional issues raised by the School did not include abridg-

ment of the liberties under the First Amendment. Finding it unnecessary to rule on the constitutional questions which it called "grave," the Court held that the evidence did not support the Postmaster General's findings as to fraud, and that the order should not be enforced.

The constitutionality of Title 39, §§ 259 and 732, the sections of the code in question in this case, was expressly passed upon for the first time in *Public Clearing House* v. *Coyne*, 194 U. S. 497. That case dealt with a fraud order issued by the Postmaster General, authorizing the interception and return to the sender of all mail addressed to a company engaged in operating an endless chain scheme. In addition to conducting the fraudulent enterprise, the company was engaged in several other kinds of businesses on a general brokerage and commission basis. None of the business of the company involved publication of a newspaper, periodical, book or other matter for the dissemination of ideas and information to the general public. The First Amendment was not urged by the company, but the Court apparently treated the question of abridgment of freedom of the press as having been settled by *Ex parte Jackson* and *In re Rapier*.

In *Lewis Publishing Co.* v. *Morgan*, 229 U. S. 288, this Court reviewed a postal statute which required newspapers and periodicals to publish statements of ownership, circulation and indebtedness and to label advertising as such, in order to retain the second-class mail rates. In answer to the objection that the statute abridged freedom of the press, the Court stated (p. 316):

> "... We repeat that in considering this subject we are concerned not with any general regulation of what should be published in newspapers, not with any condition excluding from the right to resort to the mails, but we are concerned solely and exclusively with the right on behalf of the publishers to continue to enjoy great privileges and advantages at the public

expense, a right given to them by Congress upon condition of compliance with regulations deemed by that body incidental and necessary to the complete fruition of the public policy lying at the foundation of the privileges accorded."

The reasoning of the Court amounted to a reaffirmation of the privilege doctrine.

*Badders* v. *United States*, 240 U. S. 391, sustained a conviction in a criminal prosecution for using the mails to defraud. Denial of freedom of the press was not in issue.

Exercise of the postal power to suppress future publication of a newspaper was upheld in *Milwaukee Pub. Co.* v. *Burleson*, 255 U. S. 407, a case arising under the Espionage Act prohibiting the use of the mails by publications containing matter tending to obstruct the successful prosecution of the war. The Postmaster General found that the Milwaukee Leader had frequently and persistently published articles of the kind declared non-mailable under the Act, and therefore ordered suspension of the paper's second class mailing privileges. The Supreme Court sustained the Postmaster General's suspension order, on the basis of prior decisions holding that Congress has a "practically plenary power over the mails (*Ex parte Jackson*, 96 U. S. 727; *Public Clearing House* v. *Coyne*, 194 U. S. 497, 506, 507; *Lewis Publishing Co.* v. *Morgan*, 229 U. S. 288, 313)." The Court stated that it was reasonable to conclude that the newspaper would continue its disloyal publications, and that as a practical matter it was necessary to suspend the second class rates until the newspaper purged itself and re-applied for a second class permit.

In a dissenting opinion, Mr. Justice Brandeis argued that the Postmaster General did not have the power to deny second class mailing privileges to *future* issues of the newspaper even though *past* issues were non-mailable under the Espionage Act. Even assuming that the Post-

master General acted within his statutory authority he stated that the effect of enforcing the higher mailing rates would result in the statute's violation of several constitutional provisions, including the First Amendment. Mr. Justice HOLMES agreeing, concluded that the Postmaster General had no power to bar a newspaper from the mail in the future; that refusal of the second-class rate to a newspaper "is to make its circulation impossible"; and that the powers exercised by the Postmaster General were a serious invasion of fundamental liberties.

A fraud order issued pursuant to authority of Title 39, § 259 and 732 was again before this Court in *Leach* v. *Carlile*, 258 U. S. 138. The appellant, doing business in the name of "Organo Product Company" was engaged in selling what he called "Organo Tablets", advertised as cures for many ailments. The Postmaster General found that the product advertised was not the panacea claimed and that the appellant was perpetrating a fraud on the public. Appellant attacked the findings of the Postmaster General but raised no question as to constitutionality of the fraud order or the statute under which it was issued. The Court assumed the constitutionality of the fraud order in upholding the Postmaster General's findings. Mr. Justice HOLMES dissented on the ground that the statute imposing a previous restraint violated the First Amendment.

*Early cases distinguished.* It is clear from the above review of the early cases that none of them involved a situation analogous to that in the present case. Not one of the three cases ruling on fraud orders concerned a newspaper or periodical; each dealt with a company whose business was widely different in character from the business of Facts Magazine. *American School of Magnetic Healing* v. *McAnnulty, supra* (business of curing disease through mental influences); *Public Clearing House* v. *Coyne, supra* (general brokerage and commission business in several enterprises); *Leach* v. *Carlile, supra* (vending of cure-all pills). While

the prospective effect of the fraud orders in each of the three cases was such as to destroy the business of the company (as was so recognized in the *McAnnulty* case, p. 110, and the *Carlile* case, dissenting opinion, p. 141), destruction of the business would not have resulted in suppression of a publication which disseminated ideas and information to the general public. In none of the three fraud order cases under discussion was the question of freedom of the press raised by counsel.

It must be conceded that *Public Clearing House* v. *Coyne* held squarely that the fraud order could stop all mail of the company, even though some or a large part of such mail concerned only the legitimate business of the company. Respondents contend that the *Coyne* opinion giving constitutional warrant to enforcing the law by shutting off all mail was erroneous. The exigencies of effective enforcement of a law do not justify disregard of fundamental constitutional rights. *Whitney* v. *California*, 274 U. S. 357, 374 (Mr. Justice BRANDEIS concurring). Respondents contend further that recent decisions of this Court cast doubt upon the authority of the *Coyne* case as support for the power of the Postmaster General to intercept *any* mail, fraudulent or not, because the exercise of such power would result in the violation of the First Amendment.

*Milwaukee Pub. Co.* v. *Burleson*, *supra*, upheld action by the Postmaster General which had essentially the same effect as the action of that official against Facts Magazine. That is, the action in both instances was effective to suppress the publication of the periodical in the future because of its past conduct. The Milwaukee Leader had published disloyal articles, and future publication was curtailed by denial of the second-class mail rate; Facts Magazine was found to have been engaged in a fraudulent puzzle contest, and future publication was penalized by denial of the right to receive any mail, whether or not it related to the puzzle contest. The means of suppression was differ-

ent in the two cases, but the principle of stopping future publication because of past misconduct was applied in both cases. The two cases are distinguishable, however, on two grounds: (1) the restraint imposed on the Milwaukee Leader was based primarily on the war power, and no such power is involved in the present case; (2) the published incitements were within the "clear and present danger" rule. The *Milwaukee* case should not control the decision in the present case because of the distinctions just stated. Respondents maintain that the *Milwaukee* case was incorrectly decided for the reasons stated in the dissents of Justices BRANDEIS and HOLMES and in the majority opinions of later cases.

Other earlier postal cases differed from the present case in that they involved particular exclusions of objectionable matter and were not concerned with blanket exclusions in the future. *Ex parte Jackson, supra; In re Rapier, supra; Horner* v. *United States, supra; Badders* v. *United States, supra.* Each of these cases was a criminal prosecution for the act of placing in the mails the objectionable matter. None of the cases sought to penalize the offender by denying him mailing privileges in the future because he had been guilty of a crime in the past. As to fraud, these cases apply to Facts Magazine's puzzle contest only to the extent of holding that individual issues of the magazine or individual letters that relate to the contest, when they have been proven to do so, may be barred from the mail. The cases are not authority for the proposition that because the magazine has been conducting a fraudulent contest, all mail addressed to the magazine during the continuation of the contest and after the contest has been concluded may be intercepted by the Postmaster General. They are not authority for the further proposition that a publication containing no fraudulent material may be suppressed if the publisher has been engaged in a fraudulent scheme. *Ex parte Jackson* explicitly recognizes that exclusions from the mail may not operate to deny freedom of the press.

*Lewis Publishing Co.* v. *Morgan, supra,* has no bearing on the decision of the instant case. Although the *Lewis* case has been frequently cited to substantiate plenary power in Congress to regulate the mail, the statute in the case is reconcilable with the First Amendment since the requirement for the dissemination of facts is the antithesis of restraint.

**2. *Code provisions are invalid under criteria applied in more recent decisions of this Court***

(i) *General principles asserted by more recent decisions.*

Freedom of the press, historically considered and as guaranteed by the United States Constitution in its First Amendment, has meant chiefly an immunity from *previous restraints* upon publication. *Grosjean* v. *American Press Co.,* 297 U. S. 233, 245-249; *Near* v. *Minnesota,* 283 U. S. 697, 713 *et seq.; Leach* v. *Carlile, supra* (dissenting opinion of Mr. Justice HOLMES, p. 141); *Patterson* v. *Colorado,* 205 U. S. 454, 462. However, the protection afforded to the press by the First Amendment is broader in scope than the mere prohibition of previous restraints. The Amendment excludes any power in Congress to shackle a free press and so to deprive the public of unrestricted dissemination of information and opinion, whether the assumed power takes the form of a previous restraint, an excessive subsequent punishment for abuse of the liberty of the press, or some other arbitrary legislative device that limits publication or circulation. *Milwaukee Pub. Co.* v. *Burleson, supra* (dissenting opinion of Mr. Justice BRANDEIS, 423, 430-436); *Grosjean* v. *American Press Co., supra,* p. 250; *Near* v. *Minnesota, supra,* pp. 714-715; *Lovell* v. *Griffin,* 303 U. S. 444, 451; *Schneider* v. *State,* 308 U. S. 147, 160-161.

The extent to which the government may abridge the freedom of the press by previous restraint is limited by the "clear and present danger rule." This rule has been

stated to mean that liberty of the press may be restricted only in instances where there is a clear and present danger that utterances by the press will bring about the substantive evils that Congress has the right to prevent. *Schenck* v. *United States*, 249 U. S. 47, 52; *Herndon* v. *Lowry*, 301 U. S. 242, 256; *Bridges* v. *California*, 314 U. S. 252, 260-263; *Thomas* v. *Collins*, 323 U. S. 516, 529; *Pennekamp* v. *Florida*, 328 U. S. 331; *Craig* v. *Harney*, 331 U. S. 367. The rule is applied equally to restraints or sanctions upon freedom of press and freedom of speech.

(ii) *Application of more recent decisions.*

*Freedom of press may not be abridged by previous restraints:* In 1931 the case of *Near* v. *Minnesota*, *supra*, gave new life to old concepts of protection guaranteed to the people by the First Amendment—concepts to which the early postal cases had paid lip service but had declined to apply. Many of the ideas previously urged by Justices Brandeis and Holmes achieved majority adoption in the *Near* case. In that case a Minnesota statute provided that one who engaged "in the business of regularly and customarily producing, publishing or circulating . . . a malicious, scandalous and defamatory newspaper, magazine or other periodical" was guilty of a nuisance and might be enjoined. An action was brought by the County Attorney of Hennepin County to enjoin the defendant from publishing "The Saturday Press," it being alleged that the newspaper had previously published a number of issues "largely devoted to malicious, scandalous and defamatory articles." The defendant contended that the statute violated the Fourteenth Amendment in that it deprived him of liberty of the press. In an opinion written by Chief Justice Hughes, the Court sustained this contention, holding that the Fourteenth Amendment contained, as against state action, the same guarantee of a free press as was protected against federal infringement under the First Amendment.

The Court in the *Near* case found that the Minnesota statute was a previous restraint upon publication, unjustified by the "clear and present danger" rule, and as such was inconsistent with liberty of the press under the Constitution. Concerning the scope of the doctrine of previous restraints, this Court said (pp. 713, 715-716):

> "The question is whether a statute authorizing such proceedings in restraint of publication is consistent with the conception of the liberty of the press as historically considered and guaranteed. In determining the extent of the constitutional protection, it has been generally, if not universally considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication . . .
>
> . . . . . .
>
> "The objection has also been made that the principle as to immunity from previous restraint is stated too broadly, if every such restraint is deemed to be prohibited. That is undoubtedly true; the protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases: 'When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.' *Schenck* v. *United States*, 249 U. S. 47, 52. No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops. On similar grounds, the primary requirements of decency may be enforced against obscene publications. The security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government. The constitutional guaranty of free speech does not 'protect a man from an injunction against uttering words that may have all the effect of force. *Gompers* v. *Buck Stove & Range Co.*, 221 U. S. 418, 439.' *Schenck* v. *United States, supra*. These limitations are not applicable here. . . .

"The exceptional nature of its limitations places in a strong light the general conception that liberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints or censorship. The conception of the liberty of the press in this country has broadened with the exigencies of the colonial period and with the efforts to secure freedom from oppressive administration."

The *Near* case further announced that the scope of freedom of the press under federal and state constitutions is broader than the mere prohibition of previous restraints. The Court said (pp. 713-715):

". . . The liberty deemed to be established was thus described by Blackstone: 'The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity.' 4 Bl. Com. 151, 152; see Story on the Constitution, §§ 1884, 1889. . . .

"The criticism upon Blackstone's statement has not been because immunity from previous restraint upon publication has not been regarded as deserving of special emphasis, but chiefly because that immunity cannot be deemed to exhaust the conception of the liberty guaranteed by state and federal constitutions. The point of criticism has been 'that the mere exemption from previous restraints cannot be all that is secured by the constitutional provisions'; and that 'the liberty of the press might be rendered a mockery and a delusion, and the phrase itself a by-word, if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publications' .2 Cooley, Const. Lim., 8th ed., p. 885. But

> it is recognized that punishment for the abuse of the liberty accorded to the press is essential to the protection of the public. . . . In the present case, we have no occasion to inquire as to the permissible scope of subsequent punishment."

One other holding of the *Near* case is of particular significance. The Court stated (p. 708) that "in passing upon constitutional questions the Court has regard to substance and not to mere matters of form, and that, in accordance with familiar principles, the statute must be tested by its operations and effect." Thus, the Court answered the State's contentions that the questions of the application of the statute to defendant's periodical, and of the construction of the judgment of the Trial Court were not presented for review; and that the defendant's sole attack was upon the constitutionality of the statute, however it might be applied.

Applying the principles of the *Near* case to the facts of the instant case, the code provisions here in question undoubtedly violate the freedom of the press guaranty of the First Amendment. If the right to print defamation, even habitually, cannot be made subject to previous legislative, judicial or executive restraint, publication of Facts Magazine can clearly not be restrained by administrative interception of all mail addressed to it and by the consequent destruction of the business in the manner heretofore described. The conclusion that denial of the right to receive mail is an unconstitutional previous restraint is fortified by examination of those previous restraints held by the *Near* case to be exceptions to the general rule. The safety of the Nation at war is not involved; there is no question of the "primary requirements of decency" being enforced against obscene publications; security of the community life needs no protection against "incitements to acts of violence and the overthrow by force of orderly government." If Facts Magazine was guilty of conducting a

fraudulent scheme, as charged, the Government could have begun prosecution under the criminal statute punishing the use of the mails to defraud. As the *Near* case points out, liberty of the press does not prevent punishment for abuse of the liberty. It was not open to Congress to provide the Postmaster General with a blunderbuss that strikes incidentally against fraud but principally operates as a previous restraint upon the publication of Facts Magazine.

As in the *Near* case, this Court, in passing upon the constitutionality of the code provisions, should have regard for substance, and not for form, and should test the code provisions by their operation and effect. By applying this familiar rule, this Court may disregard any claim by the Postmaster General that the fraud order in its form does not restrain the publication of Facts Magazine, but only denies the magazine the right to receive mail.

The doctrine that freedom of the press includes freedom from previous restraints received further confirmation in *Grosjean* v. *American Press Co., supra.* This was a suit by nine newspaper publishers to enjoin the imposition of a license tax, under a Louisiana statute, based on gross receipts, for the privilege of engaging in the business of publishing advertising in any newspaper, magazine, periodical, or publication having a circulation of more than 20,000 copies a week. The Court upheld the injunction on the ground that the tax operated as a previous restraint upon publication and circulation of the publications containing the taxed advertising, and was therefore an abridgment of freedom of the press under the Fourteenth Amendment. Concerning the tax as a restraint, the Court said (p. 244):

> ". . . As applied to appellees, it is a tax of two per cent, on the gross receipts derived from advertisements carried in their newspapers when, and only when, the newspapers of each enjoy a circulation of more than 20,000 copies per week. It thus operates as a restraint in a double sense. First, its effect is

to curtail the amount of revenue realized from advertising, and, second, its direct tendency is to restrict circulation. This is plain enough when we consider that, if it were increased to a high degree, as it could be if valid (A. Magnano Co. v. Hamilton, 292 U. S. 40, 45, 78 L. ed. 1109, 1114, 54 S. Ct. 599, and cases cited), it well might result in destroying both advertising and circulation."

After reviewing the history and circumstances of the adoption of the First Amendment, the Court summed up by saying (p. 249):

"In the light of all that has now been said, it is evident that . . . by the First Amendment it was meant to preclude the national government, and by the Fourteenth Amendment to preclude the states, from adopting *any form of previous restraint upon printed publication, or their circulation* . . .

. . . . . .

"The predominant purpose of the grant of immunity here invoked was to preserve an untrammeled press as a vital source of public information. The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgment of the publicity afforded by a free press cannot be regarded otherwise than with grave concern. The tax here involved is bad not because it takes money from the pockets of the appellees. If that were all, a wholly different question would be presented. *It is bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties.* A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves." (Emphasis supplied.)

As a restraint denounced in the *Grosjean* decision, the Louisiana tax on newspapers is a far less restraint than the denial to Facts Magazine of the right to receive mail and postal money orders. That tax would not necessarily have put a newspaper or magazine out of business. As the Court pointed out, the chief vice of the tax was that, if it were valid and were increased to a high degree, the circulation of the publication might be destroyed. Facts Magazine is faced with more than a danger that its publication and circulation would be destroyed, if the Postmaster General's authority should be upheld. It is faced with a certainty that this result would be accomplished by enforcement of the fraud order. The code provisions authorizing the fraud order cannot stand the test of constitutionality applied in the *Grosjean* case.

As previously noticed herein, dissenting opinions by Justices BRANDEIS and HOLMES in *Milwaukee Pub. Co.* v. *Burleson, supra,* argued the proposition that denial to a newspaper of the right to use the mail, because of past misuse of the mail, is an abridgment of freedom of the press under the First Amendment. Mr. Justice BRANDEIS recognized a general police power over the material carried in the mail, subject always to the limitations of the First Amendment. In the exercise of the power to exclude material from the mail, the Postmaster General may not exclude material that has not been found to be objectionable, for said Mr. Justice BRANDEIS (p. 423):

> "If such power were possessed by the Postmaster General, he would, in view of the practical finality of his decisions, become the universal censor of publications. For a denial of the use of the mail would be for most of them tantamount to a denial of the right of circulation."

Stating that Congress could not put indirect limitations upon the freedom of the press "which if directly attempted would be unconstitutional" Mr. Justice BRANDEIS reasoned

that denial of the second-class mail rate to a publisher was in effect a denial of the right to use the mail (p. 431):

> ". . . It is argued that although a newspaper is barred from the second-class mail, liberty of circulation is not denied; because the first and third-class mail and also other means of transportation are left open to a publisher. Constitutional rights should not be frittered away by arguments so technical and unsubstantial. 'The Constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name.' *Cummings* v. *Missouri*, 4 Wall. 277, 325."

Although the dissent of Mr. Justice HOLMES was primarily directed at the lack of authority in the statutes to sustain the Postmaster General's actions, rather than at their constitutionality, certain parts of the opinion do deal with constitutionality. Thus, the opinion stated (pp. 437-8):

> ". . . But the only power given to the Postmaster is to refrain from forwarding the papers when received and to return them to the senders. Act of June 15, 1917, c. 30, Title XII, 40 Stat. 217, 230. Act of May 16, 1918, c. 75, 40 Stat. 553, 554. He could not issue a general order that a certain newspaper should not be carried because he thought it likely or certain that it would contain treasonable or obscene talk. The United States may give up the Post Office when it sees fit but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues, and it would take very strong language to convince me that Congress ever intended to give such a practically despotic power to any one man . . .
>
> ". . . when I consider the ease with which the power claimed by the Postmaster could be used to interfere with very sacred rights, I am of opinion that the refusal to allow the relator the rate to which it was entitled whenever its newspaper was carried, on the ground that the paper ought not to be carried at all, was unjustified by statute and was a serious attack upon liberties that not even the war induced Congress to infringe."

The reasoning of Mr. Justice BRANDEIS in his dissent is applicable to the present case. He stated (p. 418):

> "The scope of the Postmaster General's alleged authority is confessedly the same whether the reason for the non-mailable quality of the matter inserted in a newspaper is that it violates the Espionage Act, or the copyright laws, or that it is part of a scheme to defraud, or concerns lotteries, or is indecent, or is in any other respect matter which Congress has declared shall not be admitted to the mails."

In the *Burleson* case, past issues of the newspaper were non-mailable because of their disloyal assertions, and future issues were in effect barred from the mail by denial of the second-class rate. In the present case, Facts Magazine had in the past conducted an allegedly fraudulent puzzle contest, and future issues of the magazine were in effect barred from the mail by denial of the magazine's right to receive mail. The second-class rate was denied on the assumption that the newspaper would continue to print disloyal articles; the right to receive mail was denied on the assumption that Facts Magazine would continue to conduct fraudulent puzzle contests. The means of stopping publication was indirect in both cases, and it was urged by the Government in the former case and will probably be urged in the latter case that there was no actual restraint on publication. However, there is no doubt that denial of the right to receive mail would stop publication of Facts Magazine as surely as denial of the second-class rate stopped publication of the Milwaukee Leader. It must be evident that abridgment of Facts Magazine's right to freedom of the press is just as drastic as was the abridgment about which Justices BRANDEIS and HOLMES complained in the *Burleson* case.

*"Clear and present danger" rule does not sustain code provisions:* In *Schenck* v. *United States, supra,* Mr. Justice HOLMES devised a new rule to apply to limitations on freedom of speech and the press. The limitation con-

sidered in that case was the prohibition against mailing printed circulars in violation of the Espionage Act. The rule as stated is (p. 52):

> "The question in every case is whether the words are used in such circumstances and are of such nature as to create a clear and present danger that they will bring about the substantive evils that Congress has the right to prevent."

The "clear and present danger rule" was later applied by this Court in a number of cases and given more comprehensive meaning. For example, *Bridges* v. *California*, 314 U. S. 263, a case involving alleged contempt by a publication, contained this statement (p. 263):

> "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. Those cases do not purport to mark the furthermost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights. For the First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech, or of the press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society will allow."

A recent statement of the application of the "clear and present danger rule" in all cases involving the liberties safeguarded by the First Amendment is found in *Thomas* v. *Collins*, 323 U. S. 516, 529-530, which passed on a Texas statute requiring labor organizers to register before soliciting members for a union:

> The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is

perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. *Cf. Schneider* v. *State* 308 U. S. 147; *Cantwell* v. *Connecticut*, 310 U. S. 296; *Prince* v. *Massachusetts*, 321 U. S. 158. That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice. Compare *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152-153.

"For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation. Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation. It is therefore in our tradition to follow the widest room for discussion, the narrowest range for its restriction, particularly when this right is exercised in conjunction with peaceable assembly. It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical are inseparable. They are cognate rights, cf. *De-Jonge* v. *Oregon*, 299 U. S. 353, 364, and therefore are united in the First Article's asurance. Cf. 1 Annals of Congress 759-760."

Applying the "clear and present danger rule" to the facts of the instant case, it is plain that a puzzle contest conducted by Facts Magazine, even though held to be fraudulent, does not present a "substantive evil" so "ex-

tremely serious" that Facts Magazine must be suppressed in order to correct the "evil." The public interest in preventing use of the mails to defraud could be protected by punishment of those responsible for the fraud, without the drastic measure of intercepting all mail addressed to Facts Magazine, fraudulent and non-fraudulent alike or by action of the Federal Trade Commission specifically declaring what statements shall be deemed deceptive. The public interest is better served by allowing the magazine itself, which is not charged with containing fraudulent matter, to continue giving information to the public.

*The Code provisions violate First Amendment in its broadest scope*: The "clear and present danger" cases construe the First Amendment as much broader than the prohibition of previous restraints. For example, the case of *Schneider* v. *State*, 308 U. S. 147, 160-161, has the following to say regarding the scope of protection under the First Amendment:

> "In every case, therefore, where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights."

It must be concluded that the code provisions at issue are violative of Facts Magazine's right to a free press not merely because they constitute a "previous restraint" but because they are unneeded to combat a "clear and present danger." These provisions interfere with a clear public

interest in the dissemination of facts and ideas. It matters not whether the fraud order be regarded as a previous restraint, excess punishment for a past abuse or an arbitrary exercise of the postal power, the liberty of the Facts Magazine to enjoy a free press is nevertheless abridged through denial of the right to receive mail and through the consequent destruction of the business of publishing it.

*The order of the Postmaster General, even as modified, violates the First Amendment:* The fraud order as purportedly modified by the Postmaster General on December 8, 1945 abridges respondent Johnson's right of freedom of speech as contest editor. Although, the fraud order does not directly affect matter deposited by her in the mails, it does bar receipt by her of all mail addressed to her as contest editor as a sanction for what she had previously deposited. In this way the order bars communication through the mails, that is, interchange of written speech, with every one in the world. Freedom of speech means more than the right to expound one's own ideas. It means the right of untrammeled discussion. Dissenting opinion by Mr. Justice FRANKFURTER; *Bridges* v. *California*, 314 U. S. 252, 281.

Since there is an obvious abridgment of freedom of speech of respondent Johnson as contest editor, it is necessary to determine whether or not that abridgment is reconcilable with the First Amendment. Concededly the right of freedom of speech guaranteed by the constitution is not an absolute one. *Patterson* v. *Colorado*, 205 U. S. 454. The protection even as to previous restraints is not absolutely unlimited. *Near* v. *Minnesota*, 283 U. S. 697, 715. The validity of previous restraints upon free speech depends upon the efficiency of the cause (the utterance) to produce the effect (the evil) which Congress has a right to prevent. *Schenck* v. *U. S.*, 249 U. S. 47, 52; *Bridges* v. *California*, 314 U. S. 252; *Pennekamp* v. *Florida*, 328 U. S. 331.

The fraud order was issued on October 1, 1945 (R. 22). Its operation was temporarily stayed by order of the United States District Court on October 2, 1945 (R. 45). This stay was continued by order of the same court dated October 19, 1945 (R. 45). A permanent injunction was granted on November 27, 1945 (R. 57). The contest on which the fraud order was based terminated on October 27, 1945 (R. 25).

In view of the termination of the contest during the course of the litigation, the fraud order if put into operation can have no effect upon the contest on which it was based but can affect only other contests which might be conducted by respondent Johnson. In order to sustain the validity of the fraud order in so far as future contests are concerned it must appear (1) that a contest is either in progress or contemplated and (2) that such contest is fraudulent. Otherwise the validity of the order depends upon the finding by the Postmaster General that respondent has conducted a fraudulent contest and therefore that all future contests will be fraudulent. This is a logical and legal *non-sequitur*. There is a presumption, not that people will violate the law, but that they will observe it.

To justify previous restraint upon respondent Johnson's freedom of speech it must be clear that her speech either is producing or will clearly produce the evil which Congress is authorized to prevent. *Schenck* v. *U. S., supra.* By "clear" and "present" it is meant that the danger is obvious and existent. *Whitney* v. *California*, 274 U. S. 357. Assuming, *arguendo,* that at the time the Postmaster General issued his original order there was a clear and present danger that respondent's utterances would produce the fraud which Congress was authorized to prevent, at the present time when the Postmaster General seeks to put his order into effect the issue of whether or not the mails are being used in a scheme to defraud has become nonexistent.

## B. THE CODE PROVISIONS DEPRIVE THE SENDERS OF MAIL TO FACTS MAGAZINE OF FREEDOM OF SPEECH IN VIOLATION OF THE FIRST AMENDMENT

The First Amendment reads in part:

> "Congress shall make no laws . . . abridging the freedom of speech . . ."

The interception of the mail of the senders deprives them of all communication with the sendee, regardless of whether the mail concerns the puzzle contest or matters of a business nature having no relation to the contest. Such a ban on free communication is inconsistent with the guarantee of free speech.

The dissenting opinion of Mr. Justice HOLMES in *Leach* v. *Carlile,* 258 U. S. 138, 140, concurred in by Mr. Justice BRANDEIS, is the only instance in which the rights of the senders of mail intercepted by a fraud order have received attention in a Supreme Court case. The question was not raised by counsel in that case. Perceiving that the statutes under which fraud orders are issued impose a previous restraint on speech, Mr. Justice HOLMES said (pp. 140-141):

> "The transmission of letters by any general means other than the postoffice is forbidden by the Criminal Code, §§ 183-185. Therefore, if these prohibitions are valid, this form of communication with people at a distance is through the postoffice alone; and notwithstanding all modern inventions letters still are the principal means of speech with those who are not before our face. I do not suppose that anyone would say that the freedom of written speech is less protected by the First Amendment than the freedom of spoken words. Therefore I cannot understand by what authority Congress undertakes to authorize anyone to determine in advance, on the

> grounds before us, that certain words shall not be uttered. Even those who interpret the Amendment most strictly agree that it was intended to prevent previous restraints. We have not before us any question as to how far Congress may go for the safety of the Nation. The question is only whether it may make possible irreparable wrongs and the ruin of a business in the hope of preventing some cases of a private wrong that generally is accomplished without the aid of the mail. Usually private swindling does not depend upon the postoffice. If the execution of this law does not abridge freedom of speech I do not quite see what could be said to do so."

The dissent criticized the holding in *Ex parte Jackson* that the First Amendment was not abridged because other media of distribution was open to the excluded matter. It then went on to conclude (p. 141):

> "... The decisions thus far have gone largely if not wholly on the ground that if the Government chose to offer a means of transportation which it was not bound to offer it could choose what it would transport; which is well enough when neither law nor the habit that the Government's action has generated has made that means the only one. But when habit and law combine to exclude every other it seems to me that the First Amendment in terms forbids such control of the post as was exercised here. *I think it abridged freedom of speech on the part of the sender of the letters and that the appellant had such an interest in the exercise of the right that he could avail himself of it in this case. Buchanan* v. *Warley,* 245 U. S. 60." (Emphasis supplied.)

The deprivation of the right of free speech of the senders of mail in the present case is much more apparent than in *Leach* v. *Carlile.* The Organo Company in *Leach* v. *Carlile* was engaged in selling "Organo Tablets through fraudulent misrepresentations sent through the mails, and the senders of the mail intercepted by the fraud order must have been with few exceptions the victims of the fraud.

The rights of these victims to the freedom of communication were the rights defended by Mr. Justice HOLMES. However, the senders of mail to Facts Magazine were chiefly persons who wrote concerning business totally unrelated to the puzzle contest.

Freedom of speech cases decided by the Supreme Court subsequent to *Leach* v. *Carlile* have not dealt with prior abridgments of the First Amendment by express application of "previous restraints" such as in the *Burleson* case dealing with freedom of press. However the guarantee of immunity from previous restraints under the First Amendment apply to freedom of speech as well as to freedom of the press, since the two freedoms have been held to be cognate rights and entitled to the same measure of protection. *De Jonge* v. *Oregon*, 299 U. S. 353, 364; *Grosjean* v. *American Press Co., supra*, p. 244; *Thomas* v. *Collins, supra*, pp. 529-530. *Patterson* v. *Colorado, supra*. Consequently, the principles of *Grosjean* v. *American Press Co., supra*, and *Near* v. *Minnesota, supra*, concerning pervious restraints support the dissenting opinion in *Leach* v. *Carlile*. There is no doubt at all that the previous restraint imposed on Facts Magazine by the interception of mail addressed to it is also a previous restraint on the senders of the intercepted mail. As to Facts Magazine, this restraint has been shown to be an abridgment of freedom of the press; as to the senders of mail to Facts Magazine, the same restraint is an abridgment of freedom of speech.

The "clear and present danger" rule has been applied in a great variety of cases in which the scope of constitutional protection of freedom of expression was an issue. *Thomas* v. *Collins, supra; Board of Education* v. *Barnette*, 319 U. S. 624, 639; *Bridges* v. *California, supra*, pp. 260-263, 314 (and cases cited therein); *Herndon* v. *Lowry, supra*, p. 255. As stated in *Herndon* v. *Lowry, supra* (p. 258):

> "The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government. The judgment of the legislature is not unfettered. The limitation upon individual liberty must have appropriate relation to the safety of the state. Legislation which goes beyond this need violates the principle of the Constitution."

The danger to the welfare and safety of this country resulting from the conduct of a puzzle contest is not so substantial or imminent as to justify infringement of the rights of free speech guaranteed to senders of mail under the First Amendment. There are legislative means of stopping a puzzle contest, if it be fraudulent, other than interception of the mail. (See Federal Trade Commission Act, 15 U. S. C. 45.)

**Question No. 2. Does the fraud order prohibit indefinitely the delivery of mail or money orders which relate to subject matters or contests other than the contest on which the order is based?**

The question must be answered in the affirmative.

The fraud order (R. 22-23) is without any time limit and is therefore applicable throughout the indefinite future. The order does not differentiate between particular mail or postal money orders which relate to the Hall of Fame Contest and general mail and money orders which relate to other matters having no connection with said contest.

The fraud order forbids payment of "*any* postal money order drawn to the order of said concerns and parties" (including those concerns and parties specifically designated and their officers and agents) and directs the Postmaster at New York "to inform the remitter of *any* such

postal money order that payment thereof has been forbidden, and that the amount thereof will be returned upon the presentation of the original order or a duplicate thereof applied for and obtained under the regulations of the Department." The fraud order instructs the Postmaster at New York "to return *all* letters, whether registered or not, and other matter * * * directed to the said concerns and parties to the postmasters at the offices at which they were originally mailed, to be delivered to the senders thereof, with the words 'Fraudulent: Mail to this address returned by order of the Postmaster General' plainly written or stamped upon the outside of such letter or matter." The order further provides for the return of letters and matter to the appropriate dead letter branch where the senders cannot be identified. The fraud order is unambiguous. There is no basis for construing the order other than as it reads.

**Question No. 2(a). Is the order within the Postmaster General's statutory authority?**

The question must be answered in the affirmative.

Title 39 U. S. C. §§ 259 and 732 empower the Postmaster General to determine whether any person or company "is conducting" a fraudulent scheme and upon such determination authorize him to instruct postmasters at which letters or other matter arrive directed to such person or company, their agents and representatives, "to return *all* such registered letters" and "all letters or matter sent by mail", "to the postmaster at the office at which they were originally mailed, with the word 'Fraudulent' plainly written or stamped upon the outside thereof," and to forbid the payment by any postmaster to said person or company of "*any* postal money-orders drawn to his or its order, or in his or its favor, or to the agent of any such person or company". (Emphasis supplied.)

**Question No. 2(b). Are these code provisions in conflict with the Constitution of the United States?**

The question must be answered in the affirmative.

In addition to violating the First Amendment as discussed under question 1(b) the code provisions violate the Fourth, Fifth, Sixth and Eighth Amendments and Article III of the Constitution. These violations arise from the fact that the fraud order prohibits the delivery of innocent mail for an indefinite time, even after the fraud has ceased and authorizes seizures of all mail addressed to respondents.

## A. ENFORCEMENT OF CODE PROVISIONS RESULT IN AN UNREASONABLE SEARCH AND SEIZURE IN VIOLATION OF THE FOURTH AMENDMENT

The interception of mail addressed to Facts Magazine constituted a violation of that portion of the Fourth Amendment reading:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ."

Mail addressed to Facts Magazine becomes its property upon deposit in the mail. *School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, 110. Use of the mails by the senders of mail addressed to Facts Magazine is a property right of the user. *Milwaukee Pub. Co.* v. *Burleson, supra*, p. 432 (dissent); *Payne* v. *National Railway Publishing Co.*, 20 App. D. C. 581, app. dismissed 192 U. S. 60; *Hoover* v. *McChesney*, 81 Fed. 472, 480. This being so, the interception of mail addressed to Facts Magazine, without regard to whether the mail was fraudulent, was an unlawful seizure.

*Hoover* v. *McChesney, supra*, involving a fraud order directed at a lottery, is squarely in point. The District Court said (p. 481):

"If we are correct in concluding that the use of the postal service of the United States by a citizen thereof is a right in the nature of a property right, then it must follow that the order of the 17th of February, 1896, of the postmaster general, which finds complainant guilty of a violation of the postal laws, and prohibits to him the use of the postal service of the United States as far as the receiving of mail is concerned, during his pleasure, is not due process of law within the constitutional meaning. *In this connection we think the fourth amendment to the constitution is also applicable,* which provides that 'the right of the people to be secured in their persons, houses, papers, and effects against unreasonable search and seizures shall not be violated, and no warrant shall issue but upon probably cause supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.' The supreme court, by Justice Field, in the case of Ex parte Jackson, says:

'A distinction is to be made between different kinds of mail matter, between what is intended to be kept free from inspection, such as letters and sealed packages subject to letter postage, and what is open to inspection, such as newspapers, magazines, pamphlets, and other printed matter purposely left in a condition to be examined. Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles. *The constitutional guaranty of the right of the people to be secured in their papers against unreasonable search and seizure extends to their papers thus closed against inspection wherever they may be; whilst in the mail they can only be opened and examined under like warrant, issued under similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household.* No law of congress can place in the hands of the officials of the postal service any authority to invade the secrecy of letters and such sealed packages in the mail, and all

regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the fourth amendment of the constitution.'" (Emphasis supplied.)

In addition to making an unlawful "seizure" of mail under the code provisions, the Postmaster General makes an unlawful "search". This is true in spite of the fact that Title 39, § 259 expressly denies authorization for "any postmaster or other person to open any letter not addressed to himself." As already seen, property to the mail passes to Facts Magazine when the mail is deposited for transmission. Mail which cannot be returned to the senders, is consigned to the dead letter office (R. 22). There the letters are held for a year, then opened, and if their senders cannot be identified the money is stripped from them and retained by the Post Office Department (39 U. S. C. 408; C. F. R. 13:10).

In *Public Clearing House* v. *Coyne*, *supra*, pp. 510-511, the Fourth Amendment was unsuccessfully raised as an objection to the interception of mail, fraudulent and non-fraudulent. Considering the claim that the intercepted mail was the property of the sendee and had been unlawfully confiscated, the Court decided that regardless of property rights (which it did not determine) the Postmaster General did not wrongfully seize the mail by detaining and returning it to the sender. However, the *Coyne* case did not deal with the application of the Amendment to an indefinite order or to a seizure that had taken place *after the fraud had ceased*. At most the *Coyne* case stands only for the inapplicability of the Amendment to fraudulent and legitimate mail alike, *while the fraud continues to exist*. After the fraud ended in the *Coyne* case, there could have been no valid reason for stopping any mail, which was innocent of fraud. Respondents contend that the *Coyne* case was incorrectly decided and should be overruled, insofar as it holds that the Fourth Amendment is not violated by the seizure, *at any time*, of any mail.

## B. THE CODE PROVISIONS DEPRIVE FACTS MAGAZINE AND SENDERS OF PROPERTY IN VIOLATION OF FIFTH AMENDMENT

The Fifth Amendment reads in part:

> "No person shall be . . . . deprived of life, liberty, or property, without due process of law . . ."

The right to use the mails by sending or receiving mail is a property right. *Milwaukee Pub. Co. v. Burleson, supra* (dissenting opinion of Mr. Justice BRANDEIS); *School of Magnetic Healing* v. *McAnnulty, supra*, p. 110; *Payne* v. *National Railway Publishing Co., supra; Hoover* v. *McChesney, supra*, p. 480. In the *Burleson* case, Mr. Justice BRANDEIS said:

> "The right which Congress has given to all properly circumstanced persons to distribute newspapers and periodicals through the mails is a substantial right. . . .
>
> "The contention that, because the rates are noncompensatory, use of the second-class mail is not a right but a privilege which may be granted or withheld at the pleasure of Congress, rests upon an entire misconception, when applied to individual members of a class. The fact that it is largely gratuitous makes clearer its position as a right; for it is paid for by taxation."

In support of his view that the use of the mails is a substantial right, Mr. Justice BRANDEIS cited *Hoover* v. *McChesney, supra*, which states that the right to use the mails is a property of both the sender and receiver of mail (p. 480):

> "It is not to be overlooked that the establishment of the postal service and its operation is the exercise of a governmental function; that the money which pays for this perfect postal system is raised by the postage charged, and all deficits paid out of

> the common treasury of the United States; that it is a monopoly which excludes not only the states, but all individuals, and that it has become a part of the business operations of the citizens of the United States, and an indispensable part in some kinds of business; and that this right to the use of the mails by sending and receiving mail is a most valuable one to the citizens, and one the depriving of which would destroy the business and the living of very many of the citizens of the United States."

In *School of Magnetic Healing* v. *McAnnulty, supra,* the right of a person to receive mail that has become his property upon deposit in the post office, and the destructive effect on the business of the receiver when that right is denied were recognized. The observations by this Court are particularly applicable to Facts Magazine and its editor-in-chief.

> "In our view of these statutes the complainants had the legal right under the general acts of Congress relating to the mails to have their letters delivered at the post office as directed. They had violated no law which Congress had passed, and their letters contained checks, drafts, money orders and money itself, all of which were their property as soon as they were deposited in the various post offices for transmission by mail. They allege, and it is not difficult to see that the allegation is true, that, if such action be persisted in, these complainants will be entirely cut off from all mail facilities, and their business will necessarily be greatly injured if not wholly destroyed, such business being, so far as the laws of Congress are concerned, legitimate and lawful" (p. 110).

Mr. Justice HOLMES dissenting in *Leach* v. *Carlile,* 258 U. S. 138, 141, doubted the constitutional validity of the drastic expedient here in question:

> "The question is only whether it may make possible irreparable wrongs and the ruin of a business in the hope of preventing some cases of a private

> wrong that generally is accomplished without the aid of the mail."

The following terse comment in *Walker* v. *Popenoe*, 149 F. (2d) 511, 513, is particularly pertinent where the business destroyed by a fraud order is a publishing business:

> "To deprive a publisher of the use of the mails is like preventing the seller of goods from using the principal highway which connects him with his market."

In *Pike* v. *Walker*, 73 App. D. C. 289, 291, 121 F. (2d) 37, 39, it was said:

> "Whatever may have been the voluntary nature of the postal system in the period of its establishment, it is now the main artery through which the business, social, and personal affairs of the people are conducted and upon which depends in a greater degree than upon any other activity of government the promotion of the general welfare. Not only this, but the postal system is a monopoly which the government enforces through penal statutes forbidding the carrying of letters by other means. It would be going a long way, therefore, to say that in the management of the Post Office the people have no definite rights reserved by the First and Fifth Amendments of the Constitution . . ."

It is conclusive that Facts Magazine and the senders of mail to Facts Magazine have been deprived of substantial property rights through the application of the code provisions permitting interception of all mail addressed to Facts Magazine. It is likewise conclusive that such deprivation of rights is a deprivation of the right to carry on business. Denial of the right to use the mails is based on supposed past misuse of the mails by Facts Magazine in conducting a puzzle contest as an incident of its main business of publishing a magazine. In order to stop the puzzle contest, the code provisions prohibit the magazine from

receiving mail of any kind, regardless of whether it is related to the puzzle contest. The senders as well as the magazine are deprived of valuable business rights by arbitrary legislation. Respondents have sufficient interest in these rights of the senders to raise the question in their own behalf.

The Supreme Court has been jealous to protect against arbitrary deprivations of the right to do business. *Adair* v. *United States*, 208 U. S. 161; *Coppage* v. *Kansas*, 236 U. S. 1; *Adams* v. *Tanner*, 244 U. S. 590; *Allgeyer* v. *Louisiana*, 165 U. S. 578. Respondents submit that the property rights of Facts Magazine and the senders of mail to use the mails in the transaction of business are entitled to protection because in application the code provisions take property without due process of law in violation of the Fifth Amendment.

## C. THE CODE PROVISIONS VIOLATE ARTICLE III, § 2, CL. 3, OF THE CONSTITUTION, BY SUBJECTING FACTS MAGAZINE AND SENDERS TO PUNISHMENT WITHOUT TRIAL BY JURY

The code provisions violate Article III, § 2, cl. 3, which reads in part:

> "The Trial of all crimes . . . shall be by Jury . . . ."

The fraud order is a punitive measure. Although it did not purport to hold Facts Magazine or the senders guilty of a crime under the criminal code, its *effect was to convict* the magazine and the senders of using the mails to defraud. Although the order did not by its terms ban Facts Magazine from the mails, the effect of the order was the same, because denial of the right to receive mail would inevitably destroy the magazine's business. Such action by the Postmaster General in order to stop a puz-

zle contest is tantamount to the levying of a very heavy fine upon Facts Magazine for supposed transgressions in the past, and punishment of the senders by denying them their legal rights to use the mails. The amount of the fine on the magazine is the value of the business. There is no legislative limitation on the amount of the fine which can thus be imposed by the Postmaster General.

Considering an analogous situation in *Milwaukee Pub. Co.*, 255 U. S. 407, Mr. Justice BRANDEIS said in his dissenting opinion (p. 434):

> ". . . I am not aware that any other civil administrative officer has assumed, in any country in which the common law prevails, the power to inflict upon a citizen severe punishment for an infamous crime. Possibly the court would hold that Congress could not, in view of Article III of the Constitution, confer upon the Postmaster General as a mere incident in the administration of his department, authority to issue an order which could operate only as a punishment. See *Wong Wing* v. *United States*, 163 U. S. 228, 235-237."

Since the trial and punishment of crimes is a function which the Constitution entrusts to the judiciary rather than to the executive department, the action of the Postmaster General, pursuant to the code provisions, was a clear infringement of Facts Magazine's and the senders' constitutional rights to a trial by jury.

## D. THE CODE PROVISIONS DENY FACTS MAGAZINE AND SENDERS THEIR RIGHTS TO A TRIAL IN ACCORDANCE WITH THE SIXTH AMENDMENT

The Sixth Amendment reads in part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . and to be

> informed of the nature and cause of the accusation; to be confronted with the witnesses against him . . . ."

A very heavy fine has been imposed on Facts Magazine by the Postmaster General, the amount of the fine being the value of the business that will be destroyed. This fine has been imposed because the Postmaster General found that the publisher had been using the mails in a fraudulent puzzle contest, which was the practical equivalent of finding the publisher guilty of the crime of using the mails to defraud. Respondents contend, in view of the Sixth Amendment, that Congress is without power to confer upon the Postmaster General authority to inflict indirectly such a substantial punishment. *Milwaukee Pub. Co.* v. *Burleson, supra* (dissenting of opinion of Mr. Justice BRANDEIS); *Callan* v. *Wilson*, 127 U. S. 540; *Thompson* v. *Utah*, 170 U. S. 343.

Violation of the senders' rights is even more obvious. To deprive them of the right to transmit mail has the effect of punishing them for using the mails to defraud, an offense for which they have not had a trial by jury.

## E. THE CODE PROVISIONS INFLICT UNUSUAL PUNISHMENT ON FACTS MAGAZINE AND SENDERS IN VIOLATION OF THE EIGHTH AMENDMENT

The Eighth Amendment provides:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

That punishment has been inflicted on Facts Magazine and innocent senders is clear. Because an administrative officer found that the magazine had been conducting a fraudulent puzzle contest, he issued an order—with full authority under the code provisions—the enforcement of

which would wreck the entire business, fraudulent and non-fraudulent alike. To deprive the senders of the right to transmit mail is punishment for no offense.

Loss to the business through inability to receive mail is in its nature indefinite in amount, but the value of the business and the length of time it could remain alive under the fraud order are factors in the ultimate determination of the amount of loss. The amount is in the nature of an excessive fine for past infractions of the *criminal* law.

It is submitted that the code provisions violate the Eighth Amendment. Clear reasoning in support of this conclusion is found in the following excerpt from the dissenting opinion of Mr. Justice BRANDEIS in *Milwaukee Pub. Co.* v. *Burleson, supra*, page 435:

> ". . . Every fine imposed by a court is definite in amount. Every fine prescribed by Congress is limited in amount. Statutes frequently declare that each day's continuation of an offence shall constitute a new crime. But here a fine imposed for a past offence is made to grow indefinitely each day—perhaps throughout the life of the publication. . . . It was assumed in *Waters-Pierce Oil Co.* v. *Texas* (No. 1), 212 U. S. 86, 111, that an excessive fine, even if definite, would violate the Eighth Amendment. Possibly the court, applying the Eighth Amendment, might again, as in *Weems* v. *United States*, 217 U. S. 349, 381, make clear the difference between unrestrained power and that which is exercised under the spirit of constitutional limitations formed to establish justice."

Deprivation of second-class mailing rates in the *Burleson* case was no more excessive a fine or unusual a punishment than the deprivation of the right to receive mail in the instant case. In both cases the action of the Postmaster General was capable of destroying the publication.

**Question No. 3. Assuming that the order is in conflict with the Code provisions or the Constitution, can it be modified in such way as to free it from statutory or constitutional objections? If so, by whom can the order be modified and by what procedure?**

The first of these questions must be answered in the negative.

*Fraud order is without valid statutory basis:* The fraud order was issued under authority of Title 39 U. S. C. §§ 259 and 732. These sections are unconstitutional in their entirety for the reasons heretofore shown. Therefore the fraud order may not be modified but must fall in its entirety.

Since no valid statutory basis ever existed for its issuance, the void order may not be modified by any Court or by the Postmaster General.

The Code Provisions being unconstitutional are not a law—they bind no one and protect no one. *Little Rock & F. S. R. Co.* v. *Worthen*, 120 U. S. 97, 101. The Code Provisions are as inoperative as if they had never been passed, for an unconstitutional act is not a law. *Chicago, I. & L. R. Co.* v. *Hackett*, 228 U. S. 559, 566.

*The Code Provisions are invalid under Rules of Statutory Construction applied by this Court*: Should the Court hold that Congress has the power to intercept all fraudulent mail but is without power to intercept mail having no relation to a prohibited enterprise, the Code Provisions are nevertheless unconstitutional in their entirety. In the instant case, there can be no separation of the legal from the illegal in the Code Provisions. The language of the Code Provisions shows clearly that the power granted extends not only to fraudulent mail but embraces prohibition of delivery of *all* mail and postal money orders, a power which is beyond the authority of Congress.

The code provisions are clearly unconstitutional under the principle of statutory construction applied in *The First Employers' Liability Case*, 207 U. S. 463, because they are too broad in their coverage. In that case the statute covered every common carrier engaged in interstate commerce as a common carrier and made the carrier liable to "any of its employees" for all damages resulting from the negligence of any officer, agent, or employee of the carrier, etc. Thus, the Act of Congress embraced subjects (interstate employees) within the authority of Congress to regulate commerce but also included subjects (intrastate employees) not within its constitutional power; the two subjects were so interblended in the statute that they were incapable of separation and the statute was held to be unconstitutional and non-enforcible.

To the argument that the statute could be interpreted so as to confine its operation only to interstate commerce by construing the words "any employee" in the statute to mean any employee when such employee is engaged only in interstate commerce, the Court said (p. 500):

> "But this would require us to write into the statute words of limitation and restriction not found in it."

And further said (pp. 501-2):

> "The principles of construction invoked are undoubted, but are inapplicable. Of course, if it can be lawfully done, our duty is to construe the statute so as to render it constitutional. But this does not imply, if the text of an act is unambiguous, that it may be rewritten to accomplish that purpose. Equally clear is it, generally speaking, that where a statute contains provisions which are constitutional and others which are not, effect may be given to the legal provisions by separating them from the illegal. But this applies only to a case where the provisions are separable and not dependent one upon the other, and does not support the contention that that which

is indivisible may be divided. Moreover, even in a case where legal provisions may be severed from those which are illegal, in order to save the rule applies only where it is plain that Congress would have enacted the legislation with the unconstitutional provisions eliminated. All these principles are so clearly settled as not to be open to controversy * * *

"As the act before us by its terms relates to every common carrier engaged in interstate commerce and to any of the employes of every such carrier, thereby regulating every relation of a carrier engaged in interstate commerce with its servants and of such servants among themselves, we are unable to say that the statute would have been enacted had its provisions been restricted to the limited relations of that character which it was within the power of Congress to regulate."

The code provisions here under attack are unconstitutional under the rule of interpretation applied in *Butts* v. *Merchants & Miners Transportation Company*, 230 U. S. 126, 133, 138. There, the Court held that an act in excess of the power of Congress is invalid in its entirety when it is not possible to separate that which is constitutional from that which is not.

In *Illinois Central Railroad Company* v. *McKendree*, 203 U. S. 514, the Court held void an *order* of the Secretary of Agriculture purporting to fix a quarantine line under the Cattle Contagious Disease Act because it applied in terms to all shipments, whether interstate or intrastate, and was an illegal attempt to regulate intrastate commerce. The Court said (p. 529): "The order is in terms single, and indivisible".

Under the reasoning in the *McKendree* case, both the code provisions and the fraud order in the instant case are "in terms single, and indivisible", prohibiting delivery of *all* mail and postal money orders regardless of their relation to any fraudulent scheme. Since the code provisions

and the fraud order are void because of their coverage, it must follow that the void fraud order may not be modified under any procedure.

The fraud order cannot be modified by any valid procedure.

*No Court may modify the void fraud order:* Aside from the invalidity of the Code Provisions and fraud order, no Court may modify the fraud order. § 259 only purports to authorize the Postmaster General to issue a fraud order "upon evidence satisfactory to him" that any person or company "is conducting" a fraudulent scheme. Here, the fraud order was issued upon a determination by the Postmaster General predicated upon the assumption that §§ 259 and 732 were constitutional. The assumption being false, no Court may say what determination the Postmaster General would have made had he realized the limitations placed upon him by the Constitution.

In *Illinois Central Railroad Company* v. *McKendree*, 203 U. S. 514, the Court said (p. 529):

> "For aught that appears upon the face of the order, the Secretary intended it to apply to all commerce, and whether he would have made such an order, if strictly limited to interstate commerce, we have no means of knowing. The order is in terms single, and indivisible."

and held the order to be void. Therefore, neither this Court nor the District Court may substitute its determination for the erroneous determination of the Postmaster General. Instead, the illegal fraud order must be enjoined in its entirety.

*Petitioner may not modify the void fraud order:* Being illegal because predicated upon unconstitutional Code Provisions, the fraud order is a nullity which may not be modified by the Postmaster General to save it under any procedure.

*The impounded funds belong to respondents*: The funds impounded by the District Court (only qualifying fees received after "2:30 P. M. October 19, 1945" (R. 45)) were first delivered by the postal authorities to each respondent to whom the envelopes were addressed, or to its, his or her agent, and were then deposited by all respondents, or their agents, with the Clerk of the District Court under a court order requiring the deposit by "plaintiffs and their agents" of the funds "with a list of the names and addresses of the persons who remitted such qualifying fees." (R. 45). Necessarily involved in this case is the right of respondents to have all the impounded funds returned to them, as plaintiffs, if the fraud order is illegal for any reason or the code provisions under which it was issued are unconstitutional. This substantial right of respondents cannot be taken away from them in the midst of the litigation by any *ex parte* modification of the fraud order, purporting to eliminate from the order parties who are respondents in the case now before this Court. The Court must determine the rights of all the parties under the record now before it, giving consideration to ownership of the funds impounded by the District Court, and being held "pending the further order" of that court (R. 45, 56-7). Approximately $51,000.00 are held under the impounding order. The fraud order does not purport to prohibit Facts Magazine from determining the winners and remitting prizes to the successful contestants, and, the contest having terminated on October 27, 1945 (R. 25), prizes have been awarded and delivered to contestants to the extent of the financial resources of Facts Magazine which was forced into bankruptcy after the impounding of its funds due largely to the adverse publicity and enforced isolation resulting from the fraud order. Contestants having enjoyed the benefits of their rights to win prizes cannot be entitled to the return of the impounded funds.

*Recent attempt by petitioner to modify void order is a nullity*: On December 8, 1947 the Postmaster General by a void *ex parte* order purported to modify the void fraud order here under attack, by striking therefrom "Facts Magazine; Henry Walsh Lee, Editor-in-Chief, Facts Magazine, and their officers and agents as such."

Petitioner may not, by such ruse, "evade or forestall a decision adverse" to him. See *Norwegian Nitrogen Products Co.* v. *Tariff Commission*, 274 U. S. 106, 112. Likewise, petitioner may not dodge and evade prejudicial answers to the constitutional questions propounded by the Court in its order of November 17, 1947. It is well established law that cases concededly otherwise moot will be dismissed only when the party so claiming is without fault in removing the subject matter of the litigation from the jurisdiction of the Court. *American Book Co.* v. *Kansas*, 193 U. S. 49; *United States* v. *Hamburg-American Co.*, 239 U. S. 466, 477; *United States* v. *Trans-Missouri Freight Asso.*, 166 U. S. 290. Furthermore, under the principle applied in numerous decisions of this Court and various Circuit Courts of Appeal, the December 8th order of petitioner does not, as the Government contends (brief, p. 3), restrict the pertinency of the problems raised by this Court's order of November 17, 1947 or remove these issues of public interest from the case. *So. Pac. Terminal Co.* v. *Int. Comm. Comm.*, 219 U. S. 498, 514-515; *McGrain* v. *Daugherty*, 273 U. S. 135, 182; *Federal Trade Commission* v. *Goodyear Tire & Rubber Co.*, 304 U. S. 257; *Spreckels Sugar Co.* v. *Wickard*, 131 F. (2d) 12, 14-15; *Walling* v. *Haile Gold Mines Inc.*, 136 F. (2d) 102, 105 and *Walling* v. *Mutual Wholesale Food & Supply Co.*, 141 F. (2d) 331, 334-335. The attempt to eliminate the specified parties from the fraud order is an admission that the Code Provisions and the original fraud order are illegal and void because they are *too broad* in their coverage. On Page 2 of the Supplemental Memorandum filed by the Solicitor General in December 1947, he states:

"Prior to this Court's order of November 17 ordering reargument no question as to the scope of the fraud order here involved had been presented to the Postmaster General. Upon consideration of that question as a result of this Court's order, the Acting Postmaster General has concluded that the original order, which shut off *all* mail addressed to the magazine, its editor-in-chief, and its other officers and agents, *was unduly broad.*" (Emphasis supplied.)

*New rules established by petitioner do not affect constitutional issues*: Recent rules established by the petitioner, after questions were propounded by this Court, do not validate the unconstitutional code provisions, do not observe the constitutional rights of respondents here in issue, and do not modify the indefinite duration of the fraud order under attack.

On November 20, 1947 (12 Fed. Reg. 7942-7944) the Postmaster General issued rules applicable in the future to cases arising under the postal fraud statutes. Section 51.28 of the rules provide for revocation and modification of fraud orders upon application therefor by any person or concern against whom a fraud order has been issued. The applicant must swear "that the *unlawful* enterprise against which the order is directed is no longer being conducted under the name or names sought to be relieved of the provisions of the order, *and* that the *unlawful scheme* will not be resumed in the future under such names or any other names." (Emphasis supplied). It thus appears that a party or concern must admit the *past* and *future illegality* of an "enterprise" previously branded as "unlawful" under a prior fraud order in order to apply for a revocation or modification thereof. If the "enterprise" against which the order was directed is honestly believed by the party or concern to be a "lawful" one and one that would be desirable to be resumed in the future, the necessary application under oath could not be made. The rule requires

a party or concern to give up his or its legal rights in order to contest the validity of a fraud order in the courts as a condition of obtaining any administrative relief in the meantime. Certainly no such rule can have any *retroactive* effect, so as automatically to limit the indefinite duration of the order here under attack or to limit the rights of respondents in the instant case to have this Court declare the code provisions and order invalid.

In the words of Justice BRANDEIS in *Milwaukee Pub. Co. v. Burleson, supra*: "It is no bar to proceedings to set aside an illegal sentence, that an application to the Executive for clemency might have resulted in a pardon." Furthermore, until November 26, 1947 (date of publication of new rules in Federal Register) no procedure was established whereby application could have been made for administrative relief from the fraud order under attack in the instant case. In other words, no application for executive clemency could have been made when respondents initiated their suit to enjoin the illegal order.

*Future protection of the public requires action by the Court*: Unless this Court passes on the validity of the code provisions and fraud order, there can be no assurance that petitioner will not issue an identical illegal order should respondents or others begin a new puzzle contest. In such event, respondents and the public will be at the mercy of petitioner until new litigation can be initiated and carried through all the courts. This Court should protect respondents from such eventuality. Furthermore, petitioner may revoke the new rules at his pleasure, thereby leaving respondents and the public in the same position they were in before the new rules were promulgated.

Any order whether modified or not can now operate only as a previous restraint upon future conduct of respondents. They are not *now* conducting a fraudulent enterprise. There is no indication that they intend to conduct one. There is therefore no such "clear and present

danger" as would warrant the present imposition of a previous restraint upon them.

Even now although the Postmaster General is fully aware that the instant contest has long since terminated, he seeks to impose a restraint upon the future activities of respondents. If he were disposed to follow his stated principles of vacating orders which can no longer prevent fraud, he would have vacated the order in full.

## CONCLUSION

**For the reasons stated, it is respectfully submitted that (1) the Code Provisions under which the fraud order was issued are unconstitutional; (2) the illegal fraud order may not be modified to free it from statutory and constitutional objections; (3) the fraud order is void because arbitrary, capricious and not supported by any substantial evidence and, (4) the judgment below should be affirmed.**

December, 1947.

Mac Asbill,
W. Lawrence Keitt,
John W. Burke, Jr.,
*Counsel for Respondents.*

# SUPREME COURT OF THE UNITED STATES

No. 50.—October Term, 1947.

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| Jesse M. Donaldson, Individually and as Postmaster General of the United States, Petitioner, *v.* Read Magazine, Inc., Literary Classics, Inc., Publishers Service Co., Henry Walsh Lee, and Judith S. Johnson. | On Writ of Certiorari to the United States Court of Appeals for the District of Columbia. |

[March 8, 1948.]

Mr. Justice Black delivered the opinion of the Court.

This case presents questions as to the validity of an order issued by petitioner, the Postmaster General, which directed that mail addressed to some of respondents be returned to the senders marked "Fraudulent," and that postal money order sums payable to their order be returned to the remitters.

The respondent Publishers Service Company has conducted many contests to promote the circulation of newspapers in which it has advertised that prizes would be given for the solution of puzzles. Through its corporate subsidiaries, respondents Literary Classics, Inc., and Read Magazine, Inc., it publishes books and two monthly magazines called *Read* and *Facts*. The place of business is in New York City.

In 1945 respondents to promote sales of their books put on a nationally advertised project, known as the Facts Magazine Hall of Fame Puzzle Contest. The Postmaster General after a hearing found "upon evidence satisfactory to him" that the "puzzle contest" was "a scheme or device for obtaining money through the mails by means of false and fraudulent pretenses, rep-

resentations, and promises, in violation of sections 259 and 732 of title 39, United States Code . . . ." Specifically, the Postmaster General found that the representations were false and fraudulent for two principal reasons. First, that prospective contestants were falsely led to believe that they might be eligible to win prizes upon payment of $3 as a maximum sum when in reality the minimum requirement was $9, and as it later developed they were finally called on to pay as much as $42 to be eligible for increased prize offers. Second, the Postmaster General found that though the contest was emphasized in advertisements as a "puzzle contest" it was not a puzzle contest; that respondents knew from experience that the puzzles were so easy that many people would solve all the "puzzles" and that prizes would be awarded only as a result of a tie-breaking letter-essay contest; and that contestants were deliberately misled concerning all these facts by artfully composed advertisements.

The contest was under the immediate supervision of respondents Henry Walsh Lee and Judith S. Johnson, editor-in-chief and "contest editor" respectively of *Facts*. The Postmaster General's original fraud order related to mail and money orders directed to

> "Puzzle Contest, Facts Magazine; Contest Editor, Facts Magazine; Judith S. Johnson, Contest Editor; Miss J. S. Johnson, Contest Editor; Contest Editor; Facts Magazine; and Henry Walsh Lee, Editor in Chief, Facts Magazine, and their officers and agents as such, at New York, New York."

Respondents filed a complaint in the United States District Court for the District of Columbia to enjoin enforcement of the order. They alleged its invalidity on the grounds that there was no substantial evidence to support the Postmaster General's findings of fraud, and that the statutory provisions under which the order

was issued authorize the Postmaster General to act as a censor and hence violate the First Amendment. The District Court issued a temporary restraining order but directed that pending further orders respondents should deposit in court all moneys and the proceeds of all checks and money orders received through the mails as qualifying fees for the Hall of Fame Puzzle Contest. After a hearing the respondents' motion for summary judgment was granted on the ground that the findings were not supported by substantial evidence. 63 F. Supp. 318. The United States Court of Appeals for the District of Columbia affirmed on the same ground, one judge dissenting. 158 F. 2d 542. We granted certiorari.

The case has been twice argued in this Court. Briefs of both parties on the first argument dealt only with the question of whether the Postmaster General's findings of fraud were supported by substantial evidence. But assuming validity of the findings, questions arose during the first oral argument concerning the scope of the fraud order. That order had included a direction to the New York postmaster to refuse to deliver any mail or to pay any money orders to *Facts*, its officers and agents, including its editor in chief, who was also editor of *Read*. The two monthly magazines, both published in New York, had an aggregate circulation of nearly five hundred thousand copies. We were told the total deprivation of the right of *Facts* and of the editor of the two magazines to receive mail and to cash money orders would practically put both magazines out of business. See *Milwaukee Publishing Co.* v. *Burleson*, 255 U. S. 407. Furthermore, the order was of indefinite duration and *Facts* and its affiliates have made a business of conducting contests to promote the circulation of books and magazines. The order, if indefinitely enforced, might have resulted in barring delivery of mail and payment of money orders in relation to other non-fraudulent con-

tests as well as legitimate magazine business. All of the foregoing raised questions about the validity and scope of the original order, if unmodified, which we deemed of sufficient importance to justify further argument. For that reason we set the case down for reargument, requesting parties to discuss the validity and scope of the order, and whether, if invalid by reason of its scope, it could be so modified as to free it from statutory or constitutional objections.[1]

Thereafter, and before reargument, the Postmaster General revoked the order insofar as it applied to *Facts* magazine, its editor-in-chief, and its officers and agents. As modified, the order bars delivery of mail and payment

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[1] "This case is ordered restored to the docket for reargument. On reargument counsel need not further discuss the sufficiency of the evidence to support the Postmaster General's findings. They are requested to discuss the following:

1. Does the fraud order prohibit delivery of mail and postal money orders to Facts Magazine and all its employees, including its editor-in-chief? If so,

(a) Is the order within the Postmaster General's authority under 39 U. S. C. Secs. 259, 732?

(b) If so, do these code provisions, in violation of the First Amendment or any other constitutional provisions, abridge the freedom of speech or press of either the senders or the sendees of the mail or the money orders?

2. Does the fraud order prohibit indefinitely the delivery of mail or money orders which relate to subject matters or contests other than the contest on which the order is based? If so,

(a) Is the order within the Postmaster General's statutory authority?

(b) If so, are these code provisions in conflict with the Constitution of the United States?

3. Assuming that the order is in conflict with the code provisions or the Constitution, can it be modified in such way as to free it from statutory or constitutional objections? If so, by whom can the order be modified and by what procedure?" 332 U. S. —.

of money orders only to addressees designated in the contest advertisements:

> "Puzzle Contest, Facts Magazine; Contest Editor, Facts Magazine; Judith S. Johnson, Contest Editor; Miss J. S. Johnson, Contest Editor; Contest Editor."

The Postmaster General, so we are informed, does not construe the modified order as forbidding delivery of mail or payment of money orders to *Facts* magazine or even to Miss Judith (J. S.) Johnson, individually. So construed, the order is narrowly restricted to mail and money orders sent in relation to the Hall of Fame Puzzle Contest found fraudulent, and would not bar deliveries to the magazines, to their editor, or to the three corporate respondents. It would bar deliveries to Judith (J. S.) Johnson, only if sent to her at the designated address and in her capacity as "Contest Editor." Likewise the District Court's order impounding funds is limited to qualifying fees received in the Hall of Fame Puzzle Contest. If the Postmaster General's action in modifying the order is valid, the questions we asked to have argued have largely been eliminated from the original order.

Respondents' contentions now are: (1) The Postmaster General lacked power to modify his original fraud order, and hence that order remains subject to any and all of its original infirmities. (2) The findings on which the order is based are not supported by substantial evidence. (3) The statutes under which the order was issued violate various constitutional provisions.

*First*. Respondents' contention that the Postmaster General was without power to modify the order by elimination of *Facts* magazine, its editor, and its officers and agents is based almost entirely on their two other grounds for asserting invalidity of the order. Of course, if the order were wholly invalid as to all of the respond-

ents for these reasons, it could not have been validated merely by eliminating some of them from its terms. But laying aside respondents' other contentions for the moment, we have no doubt as to the Postmaster General's authority to modify the fraud order.

Having concluded that the original order was broader than necessary to reach the fraud proved, the Postmaster General not only possessed the power but he had the duty to reduce its scope to what was essential for that purpose. The purpose of mail fraud orders is not punishment, but prevention of future injury to the public by denying the use of the mails to aid a fraudulent scheme. See *Comm'r* v. *Heininger*, 320 U. S. 467, 474. Such orders if too broad could work great hardships and inflict unnecessary injuries upon innocent persons and businesses. No persuasive reason has been suggested why the Postmaster General should be without power to modify an order of this kind. Such an order is similar to an equitable injunction to restrain future conduct, and like such an injunction should be subject to modification whenever it appears that one or more of the restraints imposed are no longer needed to protect the public. *United States* v. *Swift & Co.*, 286 U. S. 106, 114; see *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557, 570.

Furthermore, the modification here involved was for respondents' benefit; it gave them a part of the very relief for which they prayed. It removed the ban against delivery of mail and payment of money orders to their magazine, its editor and its agents—a ban which we were told would have done them irreparable injury if left in effect. The possibility that another order might be entered against the eliminated respondents is too remote to require us to consider the original order as though the modification had never been made. See *United States* v.

*Hamburg-American Steamship Co.*, 239 U. S. 466, 475–476.

Nor does the modification subject respondents to any disadvantage in this case in reference to the impounded funds. Those funds are sums sent in as qualifying fees for the scheme found fraudulent. They are in court custody because of the court's restraining order; but for it they would have been returned to the senders as ordered by the Postmaster General. Now, as before the fraud order was modified, their disposition is dependent entirely upon the validity of the finding of fraud. Respondents could thus claim the funds only by asserting a right growing out of the scheme found fraudulent. The court having lawful command of such funds must allocate them to the remitters if the order is valid. See *Inland Steel Co.* v. *United States*, 306 U. S. 153, 156–158; *United States* v. *Morgan*, 307 U. S. 183, 194–195.

*Second.* Respondents contend that there was no substantial evidence to support the Postmaster General's findings that they had represented that prizes could be won (1) on payment of only three dollars as contest fees or (2) by the mere solution of puzzles. They say that the very advertisements and circular letters to contestants from which these inferences were drawn by the Postmaster General contained language which showed that the first $3 series of puzzles might result in ties, making necessary a second and maybe a third $3 puzzle series, and that if these three efforts failed to determine the prize winners, they would then be selected on the basis of competitive letters, written by the tied contestants on the subject "The Puzzle I Found Most Interesting and Educational in This Contest."

There were sentences in the respondents' advertisements and communications which, standing alone, would have conveyed to a careful reader information as to the

nine-dollar fees and the letter essay feature of the contest. Had these sentences stood alone, doubtless the fraud findings of the Postmaster General would not have been justified. But they did not stand alone. They were but small and inconspicuous portions of lengthy descriptions used by respondents to present their contest to the public in their advertisements and letters. In reviewing fraud findings of the Postmaster General, neither this Court nor any other is authorized to pick out parts of the advertisements on which respondents particularly rely, decide that these excerpts would have supported different findings, and set aside his order for that reason. We consider all the contents of the advertisements and letters, and all of the evidence, not to resolve contradictory inferences, but only to determine if there was evidence to support the Postmaster General's findings of fraud. *Leach* v. *Carlile*, 258 U. S. 138, 140.

Respondents' advertisements were long; their form letters to contestants discussing the contest, its terms, and its promises were even longer than the advertisements. Paradoxically, the advertisements constituted at the same time models of clarity and of obscurity—clarity in referring to prizes and to a "puzzle contest," obscurity in referring to a remote possibility of a letter-essay contest. In bold type, almost an inch high, their advertisements referred to "$10,000 FIRST PRIZE PUZZLE CONTEST." Time after time they used the words "puzzle" and "puzzle contest." Conspicuous pictures of sample "puzzles" covered a large part of a page. Rebus "puzzles" Nos. 1 to 4 of the contest were there. An explanation of what each represented appeared above it. The first, it was explained, represented "the inventor of the phonograph and electric light," the second "a Republican President who became Chief Justice of the Supreme Court." The last two contained equally helpful clues to the "puzzles." The advertisements left no doubt that the contest

presented an opportunity to win large prizes in connection with solution of puzzles, which puzzles, to say the least, would not be too taxing on the imagination.

Readers who might have felt some reluctance about paying their money to enter an essay contest were not so impressively and conspicuously informed about that prospect; here the advertisement became a model of obscurity. In the lower left corner of one of the advertising pages appeared the "Official Rules of the Contest," to which rules references were carefully placed in various parts of the advertisement, and which were printed, as the District Court's opinion observed, "in small type." There were ten rules. About the middle of Rule 9 appeared the only reference to the possible need for letters as a means of breaking ties. And it is impossible to say that the Postmaster General drew an unreasonable inference in concluding that competitive letter-writing thus obscurely referred to was mentioned only as a remote and unexpected contingency. The same kind of obscurity and doubt occurs in reference to the cost of the contest. The District Court in an opinion holding that the Postmaster General's findings were not supported by the evidence had this to say about one advertisement which was widely used:

> "Indeed, the advertisement is by no means a model of clarity and lucidity. It is diffuse and prolix, and at times somewhat obscure. Many of its salient provisions are printed in rather small type. An intensive and concentrated reading of the entire text is indispensable in order to arrive at an understanding of the entire scheme. Nevertheless, a close analysis of this material discloses the complete plan. Nothing is omitted, concealed or misrepresented. There is no deception. The well-founded criticisms of the plaintiff's literature are a far cry from justifying a conclusion that the announcement was a fraud on

the public . . . . The conclusion is inevitable that there is no evidence to support the finding of fact on which the fraud-order is based and that, therefore, the plaintiff is entitled to a permanent injunction against the enforcement of the order."

We agree with the District Court that many people are intellectually capable of discovering the cost and nature of this contest by "intensive and concentrated reading" and by close analysis of these advertisements. Nevertheless, we believe that the Postmaster General could reasonably have concluded, as he did, that the advertisements and other writings had been artfully contrived and composed in such manner that they would confuse readers, distract their attention from the fact that the scheme was in reality an essay contest, and mislead them into thinking that they were entering a "rebus puzzle" contest, in which prizes could be won by an expenditure of not more than $3. That respondents' past experience in similar contests enabled them to know at the beginning that essay writing, not puzzle solutions, would determine prize winners is hardly controvertible on this record. That experience was borne out in this contest by the fact that of the 90,000 contestants who submitted answers to the first series of 80 puzzles, 35,000 solved all of them, and of that number 27,000 completed the first set of "tie-breaking puzzles" when the fraud order was issued. Under the circumstances, to advertise this as a puzzle contest instead of what it actually was cannot be attributed to a mere difference in "nomenclature"; such conduct falls far short of that fair dealing of which fraud is the antithesis.

Advertisements as a whole may be completely misleading although every sentence separately considered is literally true. This may be because things are omitted that should be said, or because advertisements are composed or purposefully printed in such way as to mislead. *Wiser*

v. *Lawler*, 189 U. S. 260, 264; *Farley* v. *Simmons*, 99 F. 2d 343, 346; see also cases collected in 6 Eng. Rul. Cas. 129–131. That exceptionally acute and sophisticated readers might have been able by penetrating analysis to have deciphered the true nature of the contest's terms is not sufficient to bar findings of fraud by a fact-finding tribunal. Questions of fraud may be determined in the light of the effect advertisements would most probably produce on ordinary minds. *Durland* v. *United States*, 161 U. S. 306–313, 314; *Wiser* v. *Lawler*, *supra* at 264; *Oesting* v. *United States*, 234 F. 304, 307. People have a right to assume that fraudulent advertising traps will not be laid to ensnare them. "Laws are made to protect the trusting as well as the suspicious." *Federal Trade Comm'n* v. *Standard Education Society*, 302 U. S. 112, 116.

The Postmaster General found that respondents' advertisements had been deliberately contrived to divert readers' attention from material but adroitly obscured facts. That finding has substantial support in the evidence. The District Court and the Court of Appeals were wrong in holding the evidence insufficient.

*Third.* It is contended that §§ 259 and 732 of 39 U. S. C., the sections under which this order was issued, are in conflict with various constitutional provisions and that the statutes should be held unenforceable for this reason. Specifically, it is argued that the sections authorize a prior censorship and thus violate the First Amendment; authorize unreasonable searches and seizures in violation of the Fourth Amendment; violate the due process clause of the Fifth Amendment; deny the kind of trial guaranteed in criminal proceedings by the Sixth Amendment and by Art. III, § 2, cl. 3; and inflict unusual punishment in violation of the Eighth Amendment.

In 1872 Congress first authorized the Postmaster General to forbid delivery of registered letters and payment of

money orders to persons or companies found by the Postmaster General to be conducting an enterprise to obtain money by false pretenses through the use of the mails. 17 Stat. 322–323, 39 U. S. C. § 732. In the same statute Congress made it a crime to place letters, circulars, advertisements, etc., in the mails for the purpose of carrying out such fraudulent artifices or schemes. 17 Stat. 323, 18 U. S. C. § 338. In 1889 Congress declared "non-mailable" letters and other matters sent to help perpetrate frauds. 25 Stat. 874, 39 U. S. C. § 256. In 1895 the Postmaster General's fraud order powers were extended to cover all letters or other matters sent by mail. 28 Stat. 964, 39 U. S. C. § 259. And Congress has passed many more statutes, such, for illustration, as the Securities and Exchange Act, 48 Stat. 77, 906, 15 U. S. C. § 77 (e), and the Federal Trade Commission Act as amended, 52 Stat. 114, 15 U. S. C. § 52, to protect people against fraudulent use of the mails.

All of the foregoing statutes, and others which need not be referred to specifically, manifest a purpose of Congress to utilize its powers, particularly over the mails and in interstate commerce, to protect people against fraud. This governmental power has always been recognized in this country and is firmly established. The particular statutes here attacked have been regularly enforced by the executive officers and the courts for more than half a century. They are now a part and parcel of our governmental fabric. This Court in 1904, in the case of *Public Clearing House* v. *Coyne*, 194 U. S. 497, sustained the constitutional power of Congress to enact the laws. The decision there rejected all the contentions now urged against the validity of the statutes in their entirety, insofar as the present contentions have any possible merit. No decision of this Court either before or after the *Coyne* case has questioned the power of Congress to pass these

laws. The *Coyne* case has been cited with approval many times.

Recognizing that past decisions of this Court if adhered to preclude acceptance of their contentions, respondents urge that certain of our decisions since the *Coyne* case have partially undermined the philosophy on which it rested. Respondents refer particularly to comparatively recent decisions under the First and Fourteenth Amendments.[2] None of the recent cases to which respondents refer, however, provide the slightest support for a contention that the constitutional guarantees of freedom of speech and freedom of the press include complete freedom, uncontrollable by Congress, to use the mails for perpetration of swindling schemes.

We reject the contention that we should overrule the *Coyne* case and declare these fraud order statutes to be wholly void and unenforceable.

An additional argument urged by respondents is that the fraud order statutes as interpreted and applied by the Postmaster General in this case violate some of the constitutional provisions above mentioned. We consider this suggestion only in connection with the modified order. Its future effect is merely to enjoin the continuation of conduct found fraudulent. Carried no further than this, the order has not even a slight resemblance to punishment—it only keeps respondents from getting the money of others by false pretenses and deprives them of a right to speak or print only to the extent necessary to protect others from their fraudulent artifices. And so far as the impounding order is concerned, of course respondents can have no just or legal claim to money

[2] *Grosjean* v. *American Press Co.*, 297 U. S. 233, 245–249; *Near* v. *Minnesota*, 283 U. S. 697, 713, *et seq.*; *Bridges* v. *California*, 314 U. S. 252, 260–263; *Craig* v. *Harney*, 331 U. S. 367; *Milwaukee Publishing Co.* v. *Burleson*, 255 U. S. 407.

mailed to them as a result of their fraudulent practices. Nor does the modified order jeopardize respondents' magazine except to the extent, if any, that its circulation might be dependent on monies received from this contest scheme found fraudulent. A contention cannot be seriously considered which assumes that freedom of the press includes a right to raise money to promote circulation by deception of the public.

The order as modified is valid and its enforcement should not have been enjoined. The judgments of the United States Court of Appeals for the District of Columbia and of the District Court are reversed. The cause is remanded to the District Court to dismiss the petition for injunction and to provide for proper return to the remitters of the impounded funds sent in response to the fraudulent advertisements and communications.

*It is so ordered.*

# SUPREME COURT OF THE UNITED STATES

No. 50.—October Term, 1947.

Jesse M. Donaldson, Individually and as Postmaster General of the United States, Petitioner,
*v.*
Read Magazine, Inc., Literary Classics, Inc., Publishers Service Co., Henry Walsh Lee, and Judith S. Johnson.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[March 8, 1948.]

Mr. Justice Burton, with whom Mr. Justice Douglas concurs, dissenting.

The two lower courts reviewed in detail the facts in this case. Both held that the predecessor of the present Postmaster General exceeded his authority in issuing his stringent order of October 1, 1945. The modification of that order on December 8, 1947, by the present Postmaster General, then serving as Acting Postmaster General, has restricted it to appropriate parties. It has not altered, however, the primary basis for the lower court's injunction of November 27, 1945, against the enforcement of the order. That injunction was granted because the record failed to show evidence sufficient to justify the drastic administrative action taken in reliance upon the lottery and fraud sections of the mail and money order statutes. R. S. §§ 3929 and 4041, as amended, 26 Stat. 466, 28 Stat. 964; 39 U. S. C. §§ 259 and 732. This dissent protests the overruling of the conclusions of the lower courts on this issue and seeks especially to discourage any increase, or even repetition, of the degree of censorship evidenced by this order.

The former Postmaster General applied here the drastic summary police powers entrusted to his office by Congress

to deal with fraudulent swindlers using the mail in the conduct of lotteries or any other scheme for obtaining money by false or fraudulent pretenses. No charge of a lottery or scheme of chance was made the basis for the order before us. This particular puzzle and letter-writing contest, to which the order was limited, was a contest of the familiar type which offers prizes and thereby seeks to attract prospects for later sales. The sponsor candidly stated that this contest was conducted for advertising purposes and it distributed to the contestants samples from a series of books published by its subsidiary, Literary Classics, Inc. The entrance fees of 15 cents, required to accompany the respective sets of puzzle solutions, might well add up to more than all the expenses of the program, including the substantial prizes, provided the responses were many. Such fees, however, would fail to meet those expenses if the responses were few. The financial success of the contest depended upon the number of volunteers choosing to enter it.

The District Court found:

> "'These considerations, . . . . do not justify an inference of fraud. Under no circumstances, therefore, can the puzzle contest and its descriptive literature be considered a fraudulent device or strategem [stratagem] for obtaining money. The conclusion is inevitable that there is no evidence to support the finding of fact on which the fraud order is based and that, therefore, the plaintiff is entitled to a permanent injunction against the enforcement of the order." *Read Magazine* v. *Hannegan*, 63 F. Supp. 318, 322.

The Court of Appeals found:

> "Appellant does not claim that any statement in the advertisements was untrue or that there was any departure from the procedure announced in the Offi-

cial Rules of the Contest. There is no claim by him that the judging of the letters was to be other than bona fide, or that any contestant failed to receive the promised books. No contestant, so far as the record shows, complained of being misled or defrauded. In other words, the fraud order is not premised upon specific or affirmative misstatements, or upon failure to perform as promised, but is premised upon an impression which appellant says is conveyed by the advertisements as a whole. He derives the impression from the headlines in the advertisements and the comparative urgency which he finds in some of the expressions in them.

"To support appellant's conclusion in this case, one must ascribe to the advertisements an impression directly contrary to the stated rules of the contest. One must thus assume that readers were led not to read the Rules, or were led to ignore them or to misunderstand them or to believe something else contrary to their statement. There is no evidence, we think, to support any of those assumptions. The Rules were legibly printed. They were emphasized, rather than minimized, in the text. They were clear to any reasonable mind. No contradictory expressions occurred elsewhere.

"That this contest was an advertising device designed to promote the book-publishing business of appellees must have been plain to the most casual reader. The advertisements specifically told him, 'This contest with FACTS MAGAZINE as sponsor is being presented as a means of popularizing the Literary Classics Book Club.' . . .

"We fail to see that the letters which were written to the contestants who successfully solved the first

series of puzzles, cast any complexion upon the venture different from that cast by the original advertisements themselves.

"We think that the advertisements before us fairly urged contestants to read the Rules and that the Rules stated fairly, in style of type, placement, and terms, what was proposed. That being so, and there being no ambiguity in or departure from the proposals stated, a finding of false pretenses, representations, or promises could not properly be made." *Hannegan* v. *Read Magazine*, 158 F 2d 542, 544, 545–546.

Not only do I fail to find adequate reason to overrule the findings and conclusions of the two lower courts but, on examination of the record, I agree with them. I believe that the Postmaster General exceeded his authority when he applied his drastic censorship and fraud order to this particular program. There was no compulsion on anyone to enter this contest. Everyone who did so received, as advertised, certain reprints of classical literature and, until the contest was stopped, each contestant had the advertised opportunity to win certain cash prizes.

Anyone who entered this contest to win substantial prizes by doing so little to win them should at least examine the exact terms of the contest and make himself responsible for meeting the rules prescribed by those offering to make the gifts he sought. The contestants rendered no services for which they had a right to compensation. They merely paid a small entrance fee. For that they were entitled to have the contest conducted in accordance with the rules stated.

The findings of the lower courts make it clear that there has been no claim of failure or impending failure by the sponsor to carry out the terms of the contest. The record

shows no complaint from any contestant. Nevertheless, the Postmaster General took it upon himself to stop the contest. On the evidence before him and before the courts, this was an abuse of his discretion. It was "palpably wrong and therefore arbitrary." See *Leach* v. *Carlile*, 258 U. S. 138, 140.